IN THE

Supreme Court of the United States

OCTOBER TERM—1942

No. 789

MITSUBISHI SHOJI KAISHA, LTD., a corporation, GENERAL PETROLEUM CORPORATION OF CALIFORNIA, a corporation, ROYAL INDEMNITY COMPANY, a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Petitioners (Appellants Below),

against

SOCIETE PURFINA MARITIME, a corporation,
Respondent (Appellee Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

JOHN W. CRANDALL,
GEO. WHITEFIELD BETTS, JR.,
ARCH E. EKDALE,
MARTIN J. WEIL,
Counsel for Petitioners.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit, to review a decision of that Court, rendered on December 10, 1942 (R. 770) modifying a decree of the United States District Court for the Southern District of California, Southern Division, and affirming the said decree as so modified.

Jurisdiction.

The date of the decree of the Circuit Court of Appeals is December 10, 1942 (R. 771). On January 5, 1943, the petitioners filed a petition for a rehearing in that Court and the said petition, after the Court ordered certain amendments to its opinion, was denied on January 15, 1943 (R. 772). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347(a)) and under General Rule 38 of this Court, Section 5, subdivision (b).

Statement.

This is a suit by the respondent, Societe Purfina Maritime (hereafter called "Purfina"), as alleged owner of the Belgian motor tanker *Laurent Meeus,* against the petitioner, Mitsubishi Shoji Kaisha, Ltd. (hereafter called "Mitsubishi"), the charterer of the vessel under a charter party dated September 21, 1940 (Lib. Ex. 53(4), R. 18), and against 8,598.09 long tons of Diesel oil, the cargo which had been loaded aboard the vessel at San Pedro, California, for the recovery of freight amounting to $92,279.95 alleged to be due under the charter. The oil, which was libeled under a claim of lien given by the charter, was claimed by the petitioner, General Petroleum Corporation of California (hereafter called "General Petroleum") and was released on a bond in the sum of $64,000 furnished by the petitioner, Royal Indemnity Company.

Purfina's claim is based on clause 2 of the charter (R. 18), which reads as follows:

> "2. The freight to be paid in cash in New York less 1% discount on telegraphic advice of signing Bills of Lading and is to be considered earned and not returnable ship and/or cargo lost or not lost."

Mitsubishi filed a cross libel against the *Laurent Meeus* and Purfina, claiming damages for alleged breach of charter by Purfina (R. 20-24). The Belgian Ambassador promptly communicated with the Secretary of State requesting that the *Laurent Meeus* be released from the arrest as a public vessel of Belgium. On the instructions of the Secretary of State, the United States Attorney for the Southern District of California filed a Suggestion in the District Court, setting forth the Ambassador's communication (R. 66-77). After hearings, the District Court entered an order releasing the vessel from the arrest, on the ground that she was in the possession and subject to the control of the Belgian Government (R. 85-87).

All vessels of Belgian registry were requisitioned by the Belgian Government following the German invasion of Belgium on May 10, 1940. Instructions to that effect were transmitted by the Belgian Government to the Belgian Diplomatic and Consular Officers abroad through the Belgian Embassy in London on May 19, 1940 (R. 72).

The *Laurent Meeus* left Amsterdam just before the invasion, and after stopping at Falmouth, England, made her way to Port Arthur, Texas. On June 6, 1940, while she was at that port, her master, Richard O. Lippens, was summoned by the Belgian Consul at Galveston, Texas, to appear at his office. He accordingly went to Galveston, and received from the Consul an order notifying him that his vessel had been requisitioned, and signed the order as required. On the same day Lippens instructed the chief officer to make an entry of the requisition in the ship's log (R. 206-209, 309-313).

On July 9th and 10th, Belgian tankers were notified that they might undertake round trip voyages between two ports of the American continent, at the risk of their owners,

and subject to previous approval of the Inter-Allied Shipping Commission of London, and of the competent Belgian Consul (Lib. Exs. 9 and 10, translated, R. 225, 226).

On July 25th Lippens was advised that Belgian tankers had a short time before been granted licenses for a period of four months to trade for their own account between any country of North, South or Central America, with the exception of Mexico, provided that the London Embassy should be notified when each round trip was completed (Lib. Ex. 54(27), translated, R. 503, 504).

Laurent Meeus, for whom the ship was named, was then in San Sebastian, Spain. He was the president of Companie Financiere Belge de Petroles, commonly called "Petrofina," the parent company of Purfina (R. 484-487). Jacques Meeus, his nephew, was in Texas when the vessel reached Port Arthur. After the ship's arrival at Port Arthur, Captain Lippens sent a cable to Mr. L. Castelain, head of Purfina's shipping department, who was then in Hendaye, France (Lib. Ex. 5, R. 218, 219). Lippens obtained Castelain's address from Collin & Gissel, Purfina's brokers and agents at Houston, Texas. Lippens stated in this cable that he and Jacques Meeus could represent Purfina and suggested certain employment for the vessel. Castelain, in reply, cabled Lippens approving employment of the ship (Lib. Ex. 6, translated, R. 219). In late July, Jacques Meeus received a cable from his uncle, Laurent Meeus, telling him and Lippens to decide upon the employment of the vessel (Lib. Ex. 54(28), translated, R. 504). On August 21st Meeus cabled the Belgian Economic Commission in London (hereafter called the "B. E. M."), advising the Commission that he and Lippens were managing the tanker on the authority of President Laurent Meeus, and were depositing her earnings with Collin & Gissel, as

agent and trustee for the owners (Lib. Ex. 54(29), R. 507). The B. E. M. agreed to Collin & Gissel as agents but stated that it must act as trustee for the vessel's freights (Lib. Ex. 54(30), R. 509).

After some fruitless attempts by Lippens and Meeus to secure employment for the vessel in the carriage of oil between Houston, Texas, and Tuxpan, Mexico, Lippens was advised by Collin & Gissel of a possible voyage for the vessel from New Orleans to Japan with a cargo of oil. This was the voyage just prior to the one in dispute. The proposal was submitted to the Belgian authorities and approved, and a charter was thereafter executed and the voyage performed (Lib. Ex. 11, R. 228, 229; Lib. Ex. 13, R. 230).

In the latter part of August, 1940, Jacques Meeus submitted the vessel to Simpson, Spence & Young, hereafter called "Simpson," chartering brokers in New York, for such voyages as might be secured for her. Simpson communicated with David MacNeil, an employee in Mitsubishi's traffic department, and after a preliminary conference made a written offer of the vessel to Mitsubishi, on August 27th, for two voyages from California to Japan, "subject to approval Belgium Government, London" (Lib. Ex. 53(1), R. 398). Mitsubishi made a verbal counter-offer for the vessel to Simpson for one voyage only from California to Japan, subject also to permission of the Japanese Government (R. 401). On August 28th Simpson wrote Mitsubishi accepting the counter-offer, subject to the approval of the Japanese Government (which was promptly secured) and also subject to the approval of the Belgian Government, London (Lib. Ex. 53(2), R. 402-404).

Various cables were then exchanged between Meeus and the B. E. M., in London and after considerable delay

the B. E. M. granted approval for the voyage, and thereupon the charter party, which was dated September 21, 1940, was executed (Lib. Ex. 53(4), R. 18). Under the charter the vessel was to carry about 8,500 tons of crude oil and/or Diesel oil from a safe port in California to one or two safe ports in Japan, between Yokohama and Nagasaki. The cargo loaded was Diesel oil.

The *Laurent Meeus* arrived at San Pedro on September 30, 1940, and the Merchant Ship Control granted a departure permit on October 1st. The loading of the vessel was commenced at 1:55 P. M. on October 1st, at the dock of General Petroleum, the supplier and owner of the oil, and was completed at 10:10 A. M. on October 2nd (Stipulation, R. 172). Directly after the completion of loading the master signed bills of lading for the oil (R. 254). The *Laurent Meeus* was not able to sail, however, because of the necessity of making repairs to her engines and replacements in her crew.

On October 2nd, at 7:30 P. M., Lippens received a telegram from the Belgian Ambassador at Washington ordering him to postpone sailing until further notice (Lib. Ex. 27, R. 274, 275; Stipulation, R. 91). On October 3rd the departure permit was suspended.

The freight clause, as before noted, provided that the freight should be paid on telegraphic advice of signing of the bills of lading. Purfina failed to send this telegraphic notice to Mitsubishi upon execution of the bills of lading but waited until October 11th before doing so (Respt. Exs. D and E, R. 654, 655). But at that time the vessel's sailing was under suspension by the Belgian Ambassador.

The October 2nd stop order stood until October 15th, when Lippens received a further telegram from the Ambassador authorizing him to proceed, but ordering him to

report to the British Authorities at Singapore after completion of unloading, instead of returning to the United States (Lib. Ex. 30, R. 277, 278). A departure permit was also granted by the Merchant Ship Control on that day. (It was later revoked on October 18th and a new one granted on October 19th.) The vessel was already short of a full crew and most of the remaining crew members refused to sail when the proposed change in the vessel's itinerary was announced, because it violated their articles. Moreover, practically all of the members of the crew refused to sail under any circumstances because of an article which appeared in the Los Angeles Examiner on October 19th stating that the British were planning to seize the vessel when she passed the three-mile limit (R. 303-306, 356-358).

On October 22nd the master received another telegram from the Belgian Ambassador ordering him to suspend sailing until further notice (Lib. Ex. 34, R. 280, 281). This order remained in effect until November 5th, when the master received a telegram from the Ambassador cancelling the permission to make the voyage and ordering the transshipment of the oil (Lib. Ex. 38, R. 283).

On November 16th the Belgian Consul at Los Angeles handed Lippens a note stating that the vessel's trading permits theretofore issued had been cancelled, as the need of the vessel for the purposes of State had become apparent (Lib. Ex. 41, R. 288, 289). Also, on November 16th, the Belgian Consul delivered to Lippens a statement that the Belgian Government was in possession of the vessel (Lib. Ex. 42, R. 290), and Lippens signed a statement to that effect, and also that he was holding the vessel for the Belgian Government and subject to its order (Lib. Ex. 43, R. 291). On the same day, the Belgian Consul made an entry in the vessel's Lettre de Mer, or passport, that she

was in the possession of the Belgian Government (Lib. Ex. 44, translated, R. 292).

Purfina's libel (later amended) was filed on November 17, 1940 (R. 7-17) and the cross libel of Mitsubishi was filed on November 22, 1940 (R. 20-24).

Decisions Below.

The opinion of the District Court is printed on pages 92-99 of the record and is reported in 43 Fed. Supp. 807, under the title of *The Laurent Meeus*. Its findings of fact and conclusions of law are printed at pages 99-122 of the record. The opinion of the Circuit Court of Appeals is printed at pages 745-770 of the record. The Navy Department has requested that it not be reported until after the conclusion of hostilities with Japan.

The District Court held that the *Laurent Meeus* was not fully requisitioned until November 16, 1940, when actual possession allegedly was taken by the Belgian Government; that the actions of the Government with regard to the vessel between June 6th and November 16th were merely restrictions on her movement and were not in the nature of a control that accompanies a full and complete requisition; and that in any case Mitsubishi was precluded from claiming that the vessel was requisitioned on June 6th because of the allegations of its cross libel that the vessel was owned, operated and controlled by Purfina. The Court held that if the charter was contingent upon the approval of the Belgian Government, the condition should have been inserted in the charter, and that in any case Mitsubishi, by filing its cross libel, made an irrevocable election to affirm and rely upon the charter, and was thereby precluded from claiming that the charter was dissolved

ab initio. It also held that the freight was irrevocably earned upon the signing of the bills of lading and became payable by Mitsubishi on October 11, 1940, upon receipt of telegraphic notice of the signing. The Court also held that the sailing of the vessel was prevented by the authorities of the United States and Belgium and that while Purfina was excused from performance by the provisions of the charter, Mitsubishi was liable for the freight. While the Court felt that Purfina would be unjustly enriched in a large part by the payment of the charter hire, it considered itself bound by the decisions of this Court in *The Allanwilde,* 248 U. S. 377; *The Bris,* 248 U. S. 392; *The Gracie D. Chambers,* 248 U. S. 387, and *The Malcolm Baxter, Jr.,* 277 U. S. 323. The Court further held that the vessel was not unseaworthy and that Purfina had not breached its contract by failing to sail before the suspension of the voyage, and that the failure to sail was due to Mitsubishi's failure to pay the freight. The decree ran against Mitsubishi for the full amount of the freight and against the cargo and Royal Indemnity Company, the surety on the stipulation for value, for $64,000, the amount of the stipulation, and against General Petroleum *in personam* for interest on $64,000 from December 19, 1940, to the date of the decree (R. 92-99; Findings and Conclusions, R. 99-122).

The Circuit Court of Appeals held that the requisition of June 6, 1940, was for no greater purpose than the Belgian Government's direction of the use of the vessel for Purfina's account, and that it did not affect Mitsubishi's liability for freight; also, that the stipulation for the Belgian Government's approval was not an agreement that the Government would not thereafter exercise powers which would frustrate the venture. It further held that the vessel was not unseaworthy on October 2nd and that the custom of

tankers to leave San Pedro directly after their cargoes had been loaded did not apply to a single voyage such as this. It also held that the freight clause was valid and that the freight was due and earned on the loading of the cargo and was payable when Mitsubishi received telegraphic notice on October 11th of the signing of the bills of lading; also that the restrictive acts and interferences of the Belgian and United States Governments before November 16th were but temporary obstructions, and that the voyage was not frustrated until November 16th, when the Belgian Government took over actual possession of the ship; that Purfina was excused from performing the charter by the "Restraints of Princes" clause and that it was incumbent upon Mitsubishi to show that the frustration was caused by Purfina, even if the vessel was unseaworthy on October 2nd. It held further that the cases of *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619, and *The Tornado,* 108 U. S. 342 (2 Sup. Ct. Rep. 746), were not applicable but that the controlling decisions were those in *The Allanwilde, The Gracie D. Chambers, The Bris* and *The Malcolm Baxter, Jr., supra.* The Court finally held that the award of interest against General Petroleum, the claimant of the oil, prior to the entry of the final decree, was erroneous and modified the decree by striking out the award of such interest and affirmed the decree as so modified (R. 745-770).

Questions Presented.

1. Whether the *Laurent Meeus* was requisitioned by the Belgian Government on June 6, 1940, and, if so, what were the legal effects of the requisition on the charter in question.

2. Whether the proceedings in Los Angeles on November 16, 1940, constituted the requisition of the vessel or whether they amounted simply to a cancellation of the trading permits granted to Purfina by the Belgian Government following the requisition in June.

3. Whether the granting of the said trading permits to Purfina made it a licensee of the Belgian Government and thus estopped it from relying on the Government's acts of interference as an excuse for non-performance of the charter.

4. Whether the requisitioning of the *Laurent Meeus* on June 6, 1940, made the Belgian Government in effect a party to the charter, and, if so, whether the Government's withdrawal of its approval of the voyage operated as a cancellation and dissolution of the charter.

5. Whether the condition precedent on which the parties stipulated, namely, the Belgian Government's approval of the voyage and the charter, meant a continuing approval, which survived the execution of the charter.

6. Whether the Belgian Government's withdrawal of its approval of the voyage, which was the condition upon which the venture was predicated, resulted in the dissolution of the charter, and with it the freight clause, *ab initio*.

7. Whether the non-availability of the *Laurent Meeus* for the performance of the charter, due to the acts of the Belgian Government, and in part to the acts of the United States Government, brings the present case within the rule laid down by this Court in *Texas Co.* v. *Hogarth Shipping Co.* and *The Tornado, supra,* that a contract is subject to an implied condition that it shall be dissolved if the thing

essential to its performance ceases to exist or be available for its performance, without the fault of either party.

8. Whether, under the freight clause in the charter, providing that freight should be paid in cash on telegraphic advice of signing bills of lading and was to be considered earned and not returnable, ship and/or cargo lost or not lost, the freight was due or earned on shipment of the cargo or the execution of the bills of lading, and before the dispatch of the telegraphic notice provided by the freight clause.

9. Whether Purfina, which was unable to perform its contract on October 11, 1940, because of the suspension of the vessel's sailing on October 2nd by order of the Belgian Ambassador and the withdrawal of the departure permit by the Merchant Ship Control, could impose liability for the payment of freight on Mitsubishi by telegraphing Mitsubishi on that date that bills of lading had been signed.

10. Whether the frustration of the voyage occurred on November 5, 1940, when the voyage was cancelled by the Belgian Government, or on November 16th, when the trading permits were revoked, or whether the frustration was composed of a series of acts on the part of the United States and Belgian Governments, commencing with the October 2nd suspension order and ending on November 16th.

11. Whether the series of Governmental orders, prohibitions and restrictions, commencing with the suspension order on October 2nd and culminating in the cancellation of the voyage on November 5th, should not be considered as a whole in determining the scope of the frustration and whether, in such view, the frustration did not really commence on October 2, 1940.

12. Whether Purfina was excused from performing the charter by the "Restraints of Princes" clause and the Chamber of Shipping 1937 War Risk Clauses therein.

13. Whether the case at bar is governed by the decisions in *The Allanwilde, The Gracie D. Chambers, The Bris,* and *The Malcolm Baxter, Jr., supra.*

14. Whether there is a conflict between the foregoing decisions, particularly the first three, and the decisions in *Texas Co.* v. *Hogarth Shipping Co.* and *The Tornado, supra.*

15. Whether the doctrine exemplified by *The Gracie D. Chambers, supra,* that freight, in the case of a prepaid freight clause, can be kept, if paid, where the voyage, without the fault of either party, is broken up before the vessel breaks ground at the port of shipment, is a sound one, and whether that case should be reconsidered and overruled.

16. Whether the doctrine as to freight laid down in *The Allanwilde, The Gracie D. Chambers, The Bris* and *The Malcolm Baxter, Jr.* is reconcilable with the general rule that a frustration of a contract dissolves it, and, if not, whether those cases should be reconsidered and overruled.

17. Whether Purfina, by failing to sail the *Laurent Meeus* on October 2, 1940, as soon as the cargo was loaded and the bills of lading signed, and before receipt of the order suspending the sailing, breached the charter.

18. Whether, in any event, the freight clause was properly worded to justify a recovery of freight under the circumstances here involved.

19. Whether the Belgian Government's taking over of the vessel's freights for her July voyage to Japan and its demand that the present freight be paid over to it to hold for Purfina made the Government the real party in interest so that the Court should have refused Purfina a decree under any circumstances, on the ground that the money might inure to the benefit of the Government which broke up the voyage.

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the requisition of the *Laurent Meeus* on June 6, 1940, "was for no more than the Belgian Government's direction of the use of the vessel for Purfina's account."

2. In failing to hold that the requisition was complete on June 6th, and was not rescinded or modified during the period involved herein.

3. In holding that the said requisition did not affect Mitsubishi's liability for freight.

4. In failing to hold that Purfina was the licensee of its Government, trading under temporary permits, and that therefore it was estopped from relying on the Government's acts of interference as an excuse for non-performance of the charter.

5. In failing to hold that the requirement as to the Belgian Government's approval of the venture made the Government, as the requisitioner of the vessel, a party to the contract in effect, so that its withdrawal of its approval brought about a cancellation and rescission of the charter.

6. In failing to hold that it was the proposed voyage, and not merely the charter, which was subject to the approval of the Belgian Government, and that such approval of necessity had to be a continuing one.

7. In holding that the stipulation for the Belgian Government's approval was not an agreement that that Government would not subsequently exercise powers which might cause the frustration of the charter, or, if it did so act, that the charter would be avoided.

8. In failing to hold that the Belgian Government's withdrawal of its approval of the voyage and its cancellation thereof constituted a failure of the condition precedent on which the venture was based, and thus effected a dissolution of the charter *ab initio*.

9. In failing to hold that the non-availability of the *Laurent Meeus* for the performance of the voyage, due to the acts of the Belgian Government, and partly to the acts of the United States Government, dissolved the charter under an implied condition therein, within the rule stated by this Court in *Texas Co.* v. *Hogarth Shipping Co.* and *The Tornado, supra.*

10. In holding that the freight, under the freight clause, was deemed earned and due on the loading of the cargo.

11. In holding that the freight was payable by Mitsubishi on or about October 11, 1940, when it received Purfina's telegram that the bills of lading had been signed.

12. In holding that the case at bar is governed by the cases of *The Allanwilde, The Gracie D. Chambers, The Bris,* and *The Malcolm Baxter, Jr., supra.*

13. In failing to hold that the series of acts of the Belgian Government commencing on October 2nd and ending on November 16, 1940, taken together, constituted a frustration and that therefore the frustration commenced on October 2nd.

14. In holding that the venture was not frustrated until November 16, 1940.

15. In failing to hold that since the voyage was broken up at the port of shipment, before the vessel broke ground, no freight was payable by Mitsubishi because of a complete failure of consideration.

16. In holding that Purfina brought itself within the "Restraints of Princes" clause of the charter by showing that the vessel's voyage was delayed by continued temporary restraints culminating in the frustrating act of the Belgian Government in taking the vessel over on November 16, 1940.

17. In failing to hold that the prior requisition of the vessel nullified the "Restraints of Princes" clause in the charter.

18. In holding that even if Purfina had failed in its duty to make the vessel seaworthy, the burden fell on Mitsubishi to show that Purfina had caused the loss of the voyage and that Mitsubishi had failed to make such proof.

19. In holding that Purfina established affirmatively that it did not cause or contribute to the failure of the vessel to leave San Pedro.

20. In holding that the custom of tankers to leave San Pedro directly after the loading of their cargoes and the

execution of the bills of lading did not apply to a single Asiatic voyage as was here chartered.

21. In holding that Purfina did not breach the charter in failing to sail the vessel promptly on loading the cargo because of the clause in the charter giving Mitsubishi the option of cancelling the charter if the vessel was not ready to load by October 15th.

22. In failing to hold that the freight clause was inadequately worded in any case to warrant a recovery of the freight under the circumstances presented.

23. In failing to refuse Purfina a decree on the ground that the real party in interest herein is the Belgian Government because of its taking over the vessel's freight on her prior voyage to Japan and its requirement that the freight in dispute, if collected, be paid over to it to hold as an alleged trustee for Purfina.

Reasons for Granting the Writ.

1. The Court below, in holding that the Belgian Government's requisition of the *Laurent Meeus* in June, 1940, was one of limited scope and did not affect Mitsubishi's liability to pay freight, has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The Court below, in holding that the condition precedent as to the Belgian Government's approval of the venture did not mean that the contract should fall in the event of a subsequent withdrawal of the approval, has again de-

cided an important question of federal law, which has not been, but should be, settled by this Court.

3. The Court below, in holding that the charter, and with it the freight clause, was not dissolved under an implied condition therein, when the vessel ceased to be available for the performance of the contract because of the action of the Belgian Government, has decided a federal question probably in conflict with the decisions of this Court in *Texas Co.* v. *Hogarth Shipping Co.* and *The Tornado, supra.*

4. The Court below, in holding that the present case is not distinguishable from *The Allanwilde, The Gracie D. Chambers, The Bris* and *The Malcolm Baxter, Jr., supra,* has decided an important question of law which should be settled by this Court.

5. It is desirable, it is believed, that the doctrine as to prepaid freight stated in the four cases last mentioned should be re-examined and a determination made as to whether it is reconcilable with the rule as to dissolution of a contract by frustration stated in *Texas Co.* v. *Hogarth Shipping Co.* and *The Tornado, supra,* and, if not, whether these four cases should not be overruled.

6. The Court below, in holding that freight became due and earned before the date fixed for its payment when there was no provision in the freight clause fixing any specific time when freight was deemed due or earned, has decided a question of extreme importance to ship-owners and marine underwriters, which should be settled finally by this Court.

7. The Court below, in holding that Purfina, while disabled from performing its contract, could, by its affirmative act, still impose liability on Mitsubishi for the payment of freight, has decided an important federal question which has not been, but should be, settled by this Court.

8. The Court below, in holding, in spite of the fact that the vessel could not sail from San Pedro at any time after October 2nd because of the acts of the Belgian Government, that the voyage was not frustrated until it was formally cancelled and physical possession of the ship taken in November, has decided an important question as to frustration which should be finally settled by this Court.

9. The Court below, in holding that the charter was not breached by Purfina in the vessel's failure to sail on October 2nd, has decided a question of importance to shipowners and underwriters and one which should be settled by this Court, particularly in view of the lower Court's reliance on *Malcolm Baxter, Jr., supra,* in support of its holding.

10. The lower Court, in failing to refuse Purfina a decree, in view of Purfina's agreement to turn over the freights in question to the Belgian Government to hold as an alleged trustee, but with the acknowledged power of expropriation, has rendered a decision which calls for final review by this Court.

WHEREFORE, your petitioners, referring to the annexed brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Ninth Circuit, to certify and send to this

Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court as provided by law, and that the decree of the Circuit Court of Appeals may be reversed, and that your petitioners may have such other and further relief as to this Honorable Court may seem just.

Dated, March 1, 1943.

MITSUBISHI SHOJI KAISHA, LTD.,
GENERAL PETROLEUM CORPORATION OF CALIFORNIA,
ROYAL INDEMNITY COMPANY,
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
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By—JOHN W. CRANDALL,
GEO. WHITEFIELD BETTS, JR.,
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Counsel for Petitioners.

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No.....

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SOCIETE PURFINA MARITIME, a corporation,
Respondent (Appellee Below).

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioners' first point is directed to the requisition of the *Laurent Meeus* and its effect on Mitsubishi's liability (pp. 22-26). The second point deals with the conditions to which the voyage and charter were subject (pp. 26-28). The freight clause and Purfina's attempt to impose liability on Mitsubishi are discussed in the third point (pp. 28-31). The fourth point is concerned with the "Re-

straints of Princes" clause and the question of frustration (pp. 31-36) while the fifth point deals with Purfina's alleged breach of the charter (pp. 36-38). The sixth point discusses the Belgian Government's interest herein (pp. 39-41) and the last point stresses the general importance of the questions involved (p. 41).

POINT I.

The lower Court erred in its determination as to the nature of the requisition of the *Laurent Meeus* and its effect on Mitsubishi's liability for freight.

The Court below held that the requisition was simply for the Government's direction of the use of the vessel for Purfina's account (R. 750).

The record, we submit, fails to support this finding. Certainly the Belgian Government did not construe the requisition as having any such limited scope. The Belgian Ambassador, in his letter of November 29, 1940, to the Secretary of State, attached as Exhibit B to the first Suggestion of the United States Attorney, referred to the general requisition of all Belgian vessels in May, 1940, and the specific requisition of the *Laurent Meeus* in June (R. 71-74). He stated further that subsequent to May 19, 1940, his Government, for its public use and in aid of the successful prosecution of the war, contracted to charter the *Laurent Meeus* to the British Ministry of Shipping, but that inasmuch as she was not immediately required by the Ministry the Government gave temporary permits to Purfina to operate the vessel (R. 72).

The British Ministry, as soon as the vessel was chartered to it, seems to have exercised control over the vessel equal to that of the Belgian Government. Its represen-

tatives met with those of the B.E.M. to consider whether the present voyage should be approved (Patton, R. 408, 409; Augenthaler, R. 419, 420, 425), and it covered war and marine risks on the vessel's hull and cargo (Lib. Ex. 8, R. 222, 223; Meeus, R. 495; Lib. Ex. 54 [29], R. 507; Lib. Ex. 54 [30], R. 509).

The order of requisition was entered in the ship's log on June 6th (R. 311) and the requisition was acknowledged by Captain Lippens, who thereafter complied fully with the instructions of the Belgian Government (R. 313, 295). The Belgian authorities themselves held the requisition to be in full force from June 6th on (Lib. Ex. 29, R. 507; Lib. Ex. 30, R. 509; Lib. Ex. 54 [40], R. 519, 520; Boel, R. 626, 627).

The *Laurent Meeus,* as already noted, was released from the arrest herein on the ground that she was immune as a public vessel of Belgium (R. 66-77). The Court acted on the Suggestion of the United States Attorney at the instance of the Department of State, according to the procedure outlined by this Court in *Compania Espanola* v. *The Navemar,* 303 U. S. 68, and in *Ex Parte Muir,* 254 U. S. 522. Since the Belgian Ambassador never claimed that the proceedings of November 16th constituted the requisition, but represented that they simply accomplished the cancellation of the trading permits (R. 73) the District Court's release of the ship must, it seems evident, stand as an adjudication that the *Laurent Meeus* was a public vessel of Belgium on and after June 6th.

Unquestionably the requisition was complete on June 6th and the granting of the temporary trading permits to Purfina did not revoke or suspend the requisition but simply made Purfina the licensee of the Belgian Government.

In *The Kabalo,* 67 Lloyd's List L. R. 572, the vessel, which was of Belgian registry, was requisitioned under the same procedure as was followed here and the Court held that she was a public vessel. There was no evidence, as the lower Court mistakenly stated (R. 749) that she was in the actual possession of the Belgian Government.

In *The Cristina* (1938) A. C. 485, 60 Lloyd's List L. R. 147, the vessel was held immune as a public vessel although the Republican Government in Spain claimed no more than *de facto* possession.

See also, *The Arantzazu Mendi* (1939) P. 37, 62 Lloyd's List L. R. 55. The Admiralty Division's opinion is reported in (1938) P. 233, 61 Lloyd's List L. R. 309, and that of the House of Lords in (1939) A. C., 256.

Since the *Laurent Meeus,* unknown to Mitsubishi, was under requisition on September 21, 1940, when the charter was executed, it seems clear that the Belgian Government was, in effect, Purfina's undisclosed principal. And since it was the Government's approval that gave life to the contract, the subsequent withdrawal of the approval destroyed the contract.

There is another question which flows from the requisition and that relates to estoppel. Mitsubishi did not know that the vessel had been requisitioned and had chartered no foreign ships under requisition, as its policy was not to charter such vessels (MacNeil, R. 665, 671). It entered the transaction in good faith, relying on Simpson's representation that the voyage could be made if the Belgian Government approved. The B.E.M. knew that the parties were awaiting its approval and that the charter would be signed when it approved. The approval was given and the charter was executed and then the Government withdrew its approval and cancelled the voyage.

If the Belgian Government had executed the charter, it surely would have been estopped from cancelling it, and if it had sued for this freight it likewise would have been estopped from setting up its own cancellation of the voyage, for the act of approving the voyage was not a political act but an act pertaining to the vessel's management and operation.

An estoppel may be enforced against the United States, a State or a Municipality. *United States* v. *Willamette Val. & C. M. Wagon-Road Co. et al.*, 54 Fed. 807 (C. C. Ore.). And the rule likewise would extend to foreign Governments.

Purfina was nothing but a licensee of the Belgian Government after the requisition. *City of Carbondale* v. *Wade*, 106 Ill. App. 654; *Antlers Athletic Ass'n.* v. *Hartung*, 85 Col. 125; 274 P. 831, 832.

It is of course the law that a person who is in privity with a person who is estopped, is himself bound by the estoppel. *21 Corpus Juris* page 1181, § 184. See also *Jones Store Co.* v. *Dean*, 56 Fed. (2d) 110 (C. C. A. 8); *New York Life Ins. Co.* v. *Brown*, 99 Fed. (2d) 199 (C. C. A. 4); and *Wabash Drilling Co.* v. *Ellis*, 20 S. W. (2d) 1002, 1004 (Ky.).

That Courts of Admiralty have the power to enforce an estoppel is well settled. *O'Brien* v. *Miller*, 168 U. S. 287; *Higgins et al.* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386 (C. C. A. 2), and *Olivier Straw Goods Corporation* v. *Osaka Shosen Kaisha*, 27 Fed. (2d) 129 (C. C. A. 2).

The elements of a perfect estoppel against the Belgian Government exist. Since this is so, Purfina, as the Government's licensee and in privity with it, is, it would certainly seem, estopped from raising the "Restraints of Princes" clause of the charter as an excuse for the non-performance of its contract.

The importance of the questions which arise from the requisition of the *Laurent Meeus* make it desirable, we submit, that this Court consider and settle them finally.

POINT II.

The Court below erred in failing to hold that the charter was subject to conditions precedent, one express and one implied, in the form of the Belgian Government's approval, and that when the approval was withdrawn the contract was dissolved *ab initio.*

The parties stipulated that the undertaking was subject to the approval of the Belgian Government (Lib. Ex. 53 [2], R. 402-405). And what they contemplated was not a mere permission to execute the charter, which would have been of no use alone, but an approval of the *voyage.* Simpson's letters of August 27th and 28th to Mitsubishi make this clear (Lib. Ex. 53 [1], R. 398-400; Lib. Ex. 53 [2], R. 402-405). Moreover, Simpson, when cabling London for the approval, requested the Government's approval of the "trip" (R. 406). When the approval came through it was for a "voyage" to Japan (Lib. Ex. 54 [45], R. 524, 525). All this documentary evidence was offered by Purfina's proctors themselves.

The condition was not incorporated in the charter itself but it was nevertheless a term of the contract for it was contained in a contemporaneous writing, namely, Simpson's August 28th letter, which was not in contradiction of the terms of the contract (*Wigmore on Evidence,* 3rd Ed., Vol. IX, §§ 2431, 2430).

Obviously the parties contemplated that the approval, once given, must continue, as their undertaking was based upon it. We therefore cannot follow the lower Court in

its holding that the agreement on this condition was not an agreement that if the condition failed through the withdrawal of the approval the charter was to be avoided or cancelled (R. 754). The "Restraints of Princes" clause, we submit, must be considered as subject to the overriding condition that the Belgian Government had to approve the venture and continue its approval.

There was also an implied condition in the charter that the Belgian Government's approval of the voyage would not be withdrawn, and that if it were withdrawn the withdrawal should operate as a dissolution of the charter.

In *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619, a suit was brought to recover damages for an alleged breach of a voyage charter party. The steamer *Baron Ogilvy* was named as the ship to be chartered and the intended voyage was between ports in Texas and South Africa. While the vessel was in British waters she was requisitioned by the British Government and consequently became unavailable for performance of the charter.

This Court held (p. 629) that performance of the contract had become impossible through a supervening act of State and that the contract was therefore dissolved pursuant to a condition implied in it that if "before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it."

In *The Tornado,* 108 U. S. 342 (2 Sup. Ct. Rep. 746), a suit in admiralty was brought against the cargo to recover freight. While the vessel was moored at her wharf in the port of shipment a fire broke out aboard her, and during the course of efforts to put out the fire, she sank and was thus rendered unseaworthy and incapable of earning

freight. This Court held that the owner had no claim for freight, its decision following the same general lines of reasoning as those in the *Hogarth* case.

The lower Court (R. 754, 755) thought that the above cases were distinguishable from the present one because there the shipping documents contained no clause that the freight should be deemed earned, vessel or goods lost or not lost. We cannot see how this is a valid ground of distinction, for if the contract is dissolved by operation of an implied condition, the freight clause, as a part of the contract, falls with it, leaving the carrier with nothing on which to base a claim for freight. Neither is it perceived how the fact that the *Laurent Meeus* loaded the cargo alters the situation. The performance contemplated by the parties was the *carriage* of the cargo. The loading was simply a preliminary operation.

Because of the lower Court's seeming misinterpretation of the "Restraints of Princes" clause in the face of the express condition precedent and because of the probable conflict between its decision and those of this Court in the *Hogarth* and *The Tornado* cases, *supra,* we respectfully submit that the decision should be reviewed by this Court.

POINT III.

The lower Court erred in holding that Mitsubishi became liable for the freight either before or after receipt of the telegraphic notice of the signing of the bills of lading.

The Court below, as we construe its opinion, approved the District Court's holding that the freight was due and earned when the cargo was loaded (R. 746, 747). It then

went on to hold that the freight was payable on October 11th, when Purfina telegraphed Mitsubishi that bills of lading had been signed (R. 764).

We can see no justification for holding that this freight was due or earned before it became payable under the terms of the freight clause, for the clause does not so provide. It would have been a simple matter for the drafter of the clause to have provided that freight should be due, or be deemed earned, when the cargo was loaded or the bills of lading signed. But there is no such provision. The clause is in derogation of the usual rule that freight, in the absence of a contrary agreement, is due and payable only on delivery of the cargo at destination, and therefore it must be strictly construed against the carrier. Under the clause as worded the earliest possible time when the freight could be considered due or earned, we submit, is the time fixed for its payment, namely, when the charterer received telegraphic advice that the bills of lading had been signed. Any other holding would, it seems to us, involve the remaking of the clause.

The importance of the point is obvious, for if the freight was due or earned when the cargo was loaded or the bills of lading signed, an obligation to pay (depending upon how the other angles of the case are disposed of) might have arisen before the stop order was received on October 2nd. On the other hand, if the freight was not due or earned on October 2nd, no obligation to pay it assuredly ever arose, because of the intervention of the suspension order between loading and Purfina's dispatch of the telegraphic notice on October 11th.

The District Court apparently was led into this error through a misconception of the case of *National Steam Navigation Co. Limited of Greece* v. *International Paper*

Co., 241 Fed. 861 (C. C. A. 2). There, however, the bills of lading, unlike the present charter, provided that freight was due when the goods were received on the ship and also that the freight was due in full on signing of the bill of lading. The Court, seeking to harmonize these clauses, held that the bill of lading must be construed as meaning that the freight was due when the cargo was loaded, and was payable when the bill of lading was signed. No such situation is presented here.

Now, as to the telegraphic notice. On October 11th, when Purfina at last—and then only on the suggestion of its counsel—telegraphed Mitsubishi that the bills of lading had been signed, it was unable to carry out its contract. Although it had failed to sail the vessel when the cargo was loaded and on October 11th was disabled by the October 2nd stop order from going further, it tried, by the device of telegraphing Mitsubishi, to make the latter liable for the charter hire. We cannot believe that the law will sanction any such proceeding as this.

The cases on the subject are not numerous, but there are two which are directly in point. They are *Smith Hill & Co.* v. *Pyman Bell & Co.* (1891) 1 Q. B. 742, and *National Steam Navigation Co. Limited of Greece* v. *International Paper Co.*, 241 Fed. 861 (C. C. A. 2).

In the first case one-third freight was to be paid in advance "if required." The vessel was lost directly after sailing and the ship-owner then demanded the freight. The Court held that the demand was a condition precedent to the obligation to pay and that no freight was due because the demand, coming after the vessel's loss, was too late.

In the second case the Court, although it spoke by way of dictum, made it plain (p. 863) that if the contract had been so phrased as to make freight due and payable on

tender of the bill of lading, no liability for freight would accrue where the bill of lading was tendered to the shipper after the destruction of the vessel and her cargo in a fire.

From Mitsubishi's standpoint the *Laurent Meeus,* which was unavailable for the performance of the charter, was no better than a ship destroyed.

The Court below erred, we submit, not only in its construction of the freight clause but in its holding that Purfina could make Mitsubishi liable for the payment of the freight by the expedient of sending Mitsubishi the telegram referred to. Because of the importance of these questions, particularly in their relation to the frustration question, we respectfully ask the Court to pass upon them.

POINT IV.

The lower Court erred in holding that Purfina was excused by the "Restraints of Princes" clause from performing the contract but that Mitsubishi was nevertheless required to pay the freight.

Our opponents contended, and were sustained by the lower Courts, that while the venture was frustrated by Governmental acts, and Purfina therefore was excused by the "Restraints of Princes" clause from performing, Mitsubishi was still required to pay the freight because its obligation to do so matured before the venture was frustrated. Thus there are presented the questions as to what the frustration consisted of and when it occurred and whether any obligation to pay freight accrued against Mitsubishi before the frustration took place.

We submit that on the view which both lower Courts took of the events between October 2nd and November 16th

the voyage was frustrated by the whole series of Governmental acts in combination; that the Government's cancellation of the voyage and its taking physical possession of the ship were but the culmination of an inexorable chain of events.

The situation in brief was this: Japan adhered to the Axis after the charter was signed, and Belgium—and Great Britain too—was apprehensive of the consequences. So the vessel's sailing was suspended on October 2nd. When approval was given on October 15th it was on condition that the ship proceed to Singapore after discharging the oil at Yokohama and this caused the crew to rebel because the change in itinerary violated their articles. While the master was trying to clear up the crew situation a second suspension order was issued, on October 22nd, followed by the cancellation of the voyage on November 5th.

The lower Courts found no hiatus in the chain of events, and ascribed everything that occurred from beginning to end to Governmental interference. On this basis there was a frustration right from the start, for the vessel was continuously prevented from making the voyage from the very moment the first suspension order was received on October 2nd.

If the frustration dated from October 2nd, Purfina's "matured obligation" theory falls for there was nothing in the freight clause to make freight due or earned before the telegraphic notice was sent, as shown in our third point.

A case closely resembling the present one is that of *Admiral Shipping Co.* v. *Weidner, Hopkins & Co.,* 86 L. J. K. B. 336, where the charters stipulated for the payment of hire half monthly in advance. After the outbreak of war between Russia and Germany, it was impossible, be-

cause of the orders of the Russian Government, for the vessel to leave the Baltic for England. In a suit for hire, the Court of Appeal held that the delay occasioned was of such indefinite duration as to frustrate the contemplated commercial adventure entirely, that the contract was therefore terminated and that no hire was due. Here the orders of the Belgian Government, beginning on October 2nd, produced an indefinite delay in the sailing of the *Laurent Meeus,* long before the voyage was formally cancelled.

The Court below relied on this Court's decisions in *The Allanwilde, The Gracie D. Chambers, The Bris,* and *The Malcolm Baxter, Jr.,* all of which involved prepaid freight clauses, to justify its holding that Mitsubishi was liable for this freight (R. 760-763). We shall not repeat their facts as they are set forth in the lower Court's opinion. Perhaps one or two clarifications might be added, however. In *The Gracie D. Chambers,* the Governmental embargo order was promulgated before the freight was paid but clearance was refused after payment, which was made voluntarily and without knowledge of the embargo. In *The Bris,* the shipment was made, the bill of lading was issued, and the freight was paid before the issuance of the Presidential proclamation requiring shippers to procure export licenses for varnish destined for Gothenburg, which license the shipper later was unable to secure.

There are several important features which, it is believed, distinguish the above cases, collectively and individually, from this one.

1. There, except possibly in the case of *The Gracie D. Chambers,* the obligation to pay freight had accrued and the freight had been paid before performance of the contract by the carrier was rendered impossible. Here, if

the frustration commenced on October 2nd, the freight had not become due because the freight clause did not so provide. If the frustration did not occur until November 5th, Mitsubishi still was not liable, for Purfina, we submit, could not make Mitsubishi liable for the payment of freight by sending it a telegram after the sailing had been blocked by the Belgian Government.

2. In *The Allanwilde* and *The Malcolm Baxter, Jr.*, the voyages had commenced before the Governmental embargo went into effect.

3. In *The Bris*, the absence of a United States license for the shipper's goods made it impossible for the carrier to transport them.

4. The case of *The Malcolm Baxter, Jr.* stands in a somewhat different category because it was a deviation case. It was the master's duty to seek a port of refuge under the established maritime rule, and in doing so he was not to be penalized by having the contract of carriage displaced. *Kish* v. *Taylor* (1912), A. C. 604.

5. Here the vessel, when the charter was signed, was under requisition by the Government which frustrated the voyage. Purfina, of course, knew this but made no disclosure to Mitsubishi. This existing restraint was not within the "Restraints of Princes" clause. *Rotterdamsche Lloyd* v. *Gosho Co.*, 298 Fed. 443, 445 (C. C. A. 9).

6. In those cases the United States Government did not, as was the case here, first approve the venture and then withdraw its approval after the party whose liability for freight was asserted had executed the contract on the strength of the Government's approval.

Purfina's case, in the final analysis, must be based on *The Gracie D. Chambers* decision, for that is the only one among the four in which the vessel did not break ground. If that case is held not distinguishable from the one at bar—and we believe that it is—then, we venture to suggest, its doctrine should be reviewed and the decision overruled, if necessary. When the case was before the Circuit Court of Appeals, Judge LEARNED HAND wrote a strong dissenting opinion (253 Fed. 182, 185, 186) in which he pointed out the injustice of allowing the carrier to keep the freight. He thought there was a marked distinction insofar as the ship-owner's rights were concerned, between a case where the ship had not broken ground and one where she had.

The doctrine of *The Gracie D. Chambers,* and, for that matter, the rule applied in all these four cases, with the possible exception of *The Malcolm Baxter, Jr.,* appears irreconcilable with the rule as to dissolution of contracts through frustration, as stated in *Texas Co.* v. *Hogarth Shipping Co., supra.* It seems paradoxical that the contract can be dissolved and the ship-owner still be entitled to the freight, for there is manifestly a total failure of consideration. The dissolution doctrine should be followed through to its logical conclusion, which, it seems to us, is that the dissolution of a shipping contract through a frustration carries with it the prepaid freight clause, if it contains one. It is incorrect, we believe, to say that such a dissolution does not wipe out so-called "accrued obligations." It is just as logical to say that a shipper has an "accrued right" to have his goods carried as to say that the carrier has an "accrued right" to freight under the prepaid freight clause. Plainly no "rights" of any kind should survive a dissolution under an implied condition, if the *Hogarth* case states the correct rule, as we believe it does.

Because of the importance of the questions which are discussed under this point, we respectfully ask this Court to issue the writ prayed for to the end that they may be passed upon and definitely settled.

POINT V.

The lower Court erred in holding that Purfina did not breach the charter.

If the contract was dissolved through failure of the condition precedent this point of course would have no standing, for in such event Mitsubishi's cross-libel would fall equally with Purfina's claim for freight.

As we have seen, the loading of the cargo was completed at 10:10 A. M. on October 2nd. Directly afterward the master signed the bills of lading. The departure permit from the Merchant Ship Control was received on October 1st, and although the vessel had most of October 2nd in which to sail before the Belgian Government's stop order was received clearance was not applied for. The vessel failed to sail during the day of October 2nd for two reasons: First, her engines required repairs and overhauling, and, second, she had an insufficient crew.

The work on the engines, according to the chief engineer, required from three to four days. Trouble was experienced with the engine valves before the ship arrived at San Pedro, and it was known that the work would have to be done (Van Elsen, R. 643, 645).

According to the well-known and uniform custom at San Pedro tankers had all preliminaries completed before completion of loading and left almost directly thereafter. Repairs always preceded loading (Green, R. 198-203; Wick-

ersham, R. 718-721; Bartlett, R. 709-712). Notwithstanding that it was known beforehand that the engine repairs and alterations were necessary, Purfina loaded the cargo first and then proceeded with repairs, instead of reversing the procedure in accordance with the usual custom. Had the customary procedure been followed, the oil would not have been on the vessel when the stop order was received on October 2nd. The custom of the port was by implication incorporated in the charter. *25 Corpus Juris Secundum,* § 21, p. 109; *Lillard* v. *Kentucky Distilleries & Warehouse Co.*, 134 Fed. 168 (C. C. A. 6); *Bullock and others* v. *Finley,* 28 Fed. 514 (C. C. Ohio); and *The Queen of the East,* 12 Fed. 165 (C. C. E. D. La.).

The lower Court simply held that the custom did not apply to a single Asiatic voyage such as this one (R. 755, 756). The record contains nothing, however, which lends any support to this finding.

The Court also cited clause 22 of the charter, which gave Mitsubishi the option of cancelling the charter (R. 18) if the ship was not ready to load by October 15, 1940, and held in substance that the charter had not been breached because Purfina had until October 15th in which to load and make repairs (R. 756). This view appears clearly untenable because the vessel did load before October 15th, thus making the cancellation clause inoperative.

The second reason for the vessel's failure to sail during the day of October 2nd was the lack of a full crew. This was conceded by the ship's agents (R. 477, 478). On the vessel's arrival the personnel was greatly reduced through discharge, illness and desertion (Lib. Ex. 46, R. 323, 324). Seven Scandinavians were signed on in the afternoon of October 2nd, but two officers and the electrician and carpenter were not replaced (R. 338-340).

The *Laurent Meeus* was unseaworthy both with respect to her engines and her crew on October 2nd, and because she was unable to sail for these reasons, Purfina, we submit, broke the charter.

In addition to being liable to Mitsubishi for any damages resulting from the breach, Purfina also thereby forfeited any claim for freight. *The Great Indian Peninsula Railway Company* v. *Turnbull,* 53 L. T. R. 325; *Cosmopolitan Shipping Company, Inc.* v. *Hatton & Cookson, Ltd.,* 34 Lloyd's List L. R., 231; *Smith Hill & Co.* v. *Pyman Bell & Co.* (1891), 1 Q. B. 742; *Weir & Co.* v. *Girvin & Co.* (1899), 1 Q. B. 193; affirmed (1900), 1 Q. B. 45.

The lower Court held (R. 763) that even if Purfina had failed in its duty to make the vessel seaworthy for the voyage, the burden fell upon Mitsubishi to show that such failure had caused the loss of the voyage, citing *The Malcolm Baxter, Jr., supra.*

We believe that the Court erred in holding that the *Baxter* case, involving a deviation with special circumstances, is applicable here. In deviation cases like *The Malcolm Baxter, Jr.,* the Courts are dealing with a special situation, where a vessel at sea, whatever the cause, finds herself in a perilous position. Under such circumstances it is held to be the duty of the master to seek a port of refuge for the purpose of protecting life and property and if he does so he is not penalized by having the contract of carriage displaced.

We submit that the question as to whether Purfina breached the charter, particularly in the light of this Court's decision in *The Malcolm Baxter, Jr., supra,* and its asserted applicability here, is of sufficient importance and general interest to be reviewed by this Court.

POINT VI.

The Belgian Government, which cancelled the voyage, has an interest in this litigation, arising from its sovereign power to expropriate the freight sued for, which, if collected, it will receive from Purfina. The lower Court, apart from anything else, erred in granting Purfina a decree under these circumstances.

Although Meeus and Lippens wanted the ship's regular agents to hold her freights as trustee, the B. E. M. refused. (Meeus, R. 545; Lippens, R. 351; Lib. Ex. 54 (30) R. 509) The B. E. M. insisted that all the freights of the vessel must be paid over to it to hold as an alleged trustee for Purfina. When there was a delay in turning over the July freights it issued a peremptory order to Meeus to surrender them forthwith at the risk of having other measures taken (Lib. Ex. 54 (37), R. 517). Arrangements were finally made for the transfer of those freights (Lib. Exs. 54 (39) and 54 (38), R. 518, 519; also Exs. 54 (40) and 54 (41), R. 519-521).

The B. E. M. refused even to consider the application for its approval of the present voyage until assured that it would get the vessel's July freight and when, after a delay of almost a month, it finally gave its approval it was on the condition that the freight in dispute also should be paid over to it (Augenthaler, R. 419, 420; Lib. Ex. 54 (53), translated, R. 511, 512; Lib. Exs. 54 (45) and 54 (46), translated, R. 524-526; Lib. Ex. 54 (51), translated, R. 535).

Captain Rene Boel, head of the B. E. M., said that the B. E. M. was holding the freight moneys for the account of Purfina. But he could point to nothing but a credit entry in the books of the B. E. M. There was neither a trust account nor a special account. The freights seemingly were

intermingled with the other funds of the B. E. M. Boel said that the moneys were paid to the Belgian Embassy in Washington and credited to the B. E. M. in London; that the Belgian Embassy had the money for account of the B. E. M. in London but had not transferred the money to London (R. 623, 624). The Belgian Ambassador declined our invitation to appear and testify in this matter (R. 637, 638).

So far as the record discloses, the Belgian Government was simply a debtor of Purfina with respect to the *Laurent Meeus* freights, and while the Government might have to account to Purfina on the termination of the war (although this does not necessarily follow), there is no reason why the Government cannot now expropriate the funds and use them for whatever purpose it desires. In fact the very peremptoriness of the Government's demands for the freights justifies the suspicion that it was not so much interested in holding them for Purfina as in building up dollar exchange in the United States.

Although the Belgian Government is not a formal party herein, a Court of Admiralty can look beyond the pleadings and see where the real interest lies, and take appropriate action, if necessary. *Benedict on Admiralty,* 6th Edition, Vol. I, § 71, pp. 148, 150. *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184, 194; *Higgins et al.* v. *Anglo Algerian S. S. Co.,* 248 Fed. 386, 389 (C. C. A. 2).

The lower Court held that the "trusteeship" of the vessel's net earnings "after Purfina had discharged its obligations to Mitsubishi is not a matter of the latter's concern" (R. 753). We must respectfully disagree as to this. We think that it is very much Mitsubishi's concern. In short, it seems to us that it would be unconscionable to make it possible for the Belgian Government, which approved the voyage and then cancelled it, to reap even an indirect

benefit out of the freight, if recovered by Purfina, and we strongly feel that the lower Court erred in making this possible. We submit that this aspect of the case is of sufficient importance to warrant review by this Court in the event of a decision adverse to Mitsubishi on the other points involved.

POINT VII.

The questions presented are of great importance and are of general interest to the shipping world and to the public at large.

This case, as we have endeavored to make clear, involves many questions of great importance to ship-owners, charterers, underwriters, shippers and the public at large. The requisition of the *Laurent Meeus* and the subsequent issuance of trading permits to Purfina present most interesting questions as to their effect upon the rights of the parties herein. Then there is the question as to what effect the stipulation for the Government's approval of the voyage and the subsequent withdrawal of the approval had on Mitsubishi's alleged liability for freight. Also, the circumstances involved in the frustration, the peculiar wording of the freight clause, and the attempt of Purfina to impose liability on Mitsubishi under the clause after the voyage was blocked, present questions of unusual interest and importance. Moreover, it is advisable, we submit, that a final determination be made as to the applicability, if any, of this Court's decisions in *The Allanwilde* and companion cases to a situation like this, and that a complete review of the question of frustration in its relation to the prepaid freight clause should be made in the particular light of the other decisions of this Court as to the dissolution of contracts through frustration.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Ninth Circuit should be granted.

Dated, March 1, 1943.

Respectfully submitted,

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(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 789

MITSUBISHI SHOJI KAISHA, LTD., a corporation, GENERAL PETROLEUM CORPORATION OF CALIFORNIA, a corporation, ROYAL INDEMNITY COMPANY, a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,
Petitioners (Appellants Below),

—against—

SOCIETE PURFINA MARITIME, a corporation,
Respondent (Appellee Below).

BRIEF ON BEHALF OF RESPONDENT.

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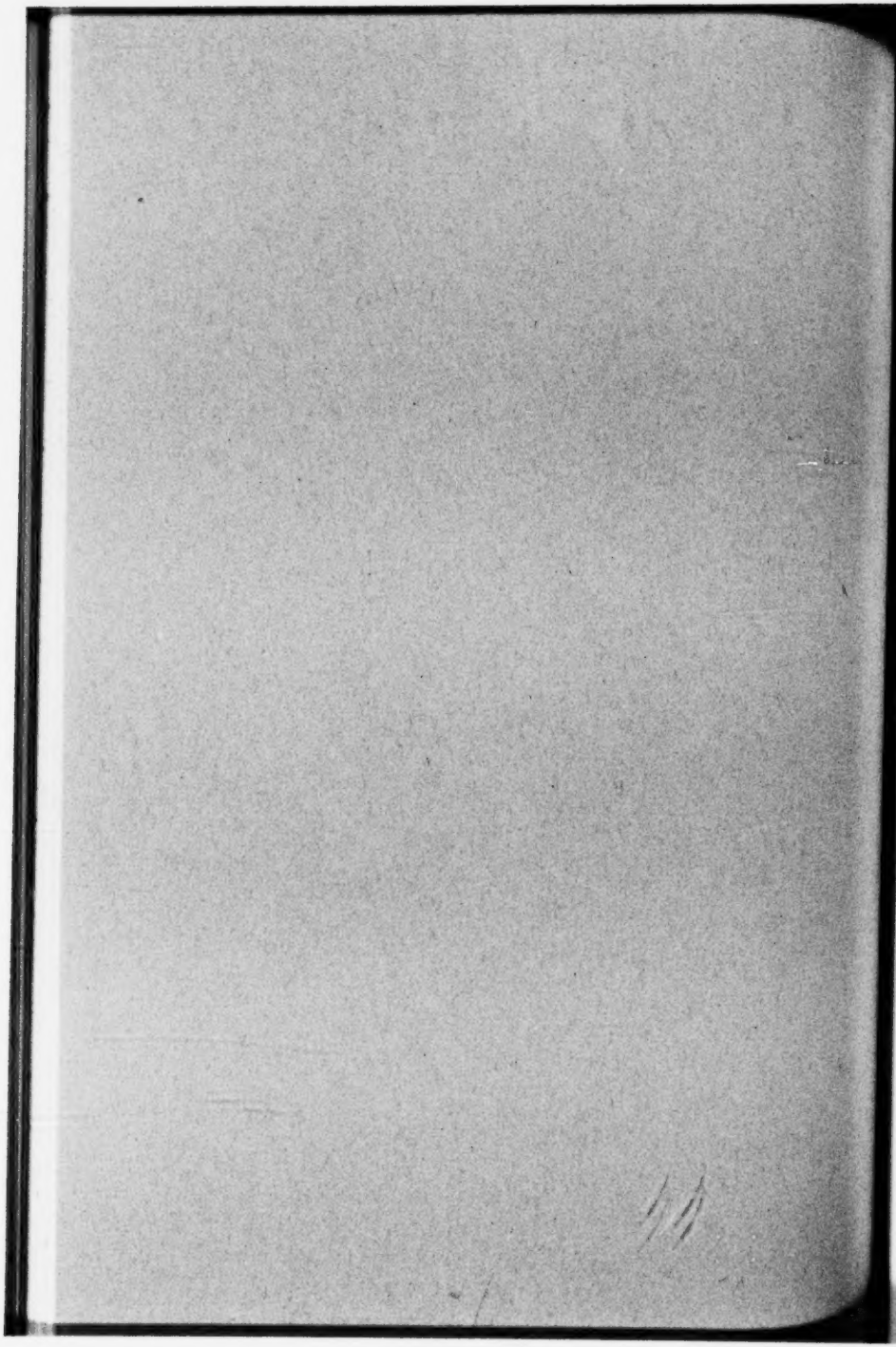

INDEX.

TABLE OF CASES CITED:

IN THE

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BRIEF ON BEHALF OF RESPONDENT.

Statement.

The statement (of the case) in the petition is inadequate. Rather than extend this brief by a restatement, we refer the Court to the clear and concise statement of the case given in the opinion of the Circuit Court of Appeals (R. 745-770).

The Courts Below Concurrently Found the Facts Against the Petitioners.

The District Court in deciding the many issues of fact and law presented by the case, filed no less than forty-six findings of fact (R. 99-117) and thirteen

conclusions of law (R. 118-122). The findings of fact are accepted by the Circuit Court of Appeals (R. 745-770), and there is no disagreement between the two Courts as to the conclusions of law, except as to the assessment of interest and costs against the petitioner General Petroleum Corporation.

Decree of the District Court.

The decree of the District Court (R. 123-126) awarded freight money to Purfina* as follows: against Mitsubishi in the full amount of the freight money, with interest and costs; against General Petroleum and Royal, claimant of, and stipulator for release of, the cargo, respectively, in the sum of $64,000 (the amount of the stipulation) under the charter party clause giving a lien on the cargo for freight; with interest on said $64,000. against Royal from the date of the decree and against General Petroleum from December 19, 1940, when it filed exceptions to the libel and thereby contested Purfina's suit for the freight money. The decree provided that the aggregate sum to be recovered by Purfina from all parties should not in any event exceed the total amount awarded by the decree against Mitsubishi. The decree dismissed the cross-libel of Mitsubishi against Purfina and the "Laurent Meeus".

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* Following the abbreviations of the petition and of the opinion of the Circuit Court of Appeals, we shorten respondent Societe Purfina Maritime to Purfina, petitioners Mitsubishi Shoji Kaisha, Ltd., to Mitsubishi, General Petroleum Corporation of California to General Petroleum, and Royal Indemnity Company to Royal.

Decree of the Circuit Court of Appeals.

From this decree Mitsubishi and the other petitioners appealed. The Circuit Court of Appeals affirmed the decree of the District Court in every respect except the award of interest from the date of contest to the date of the decree against General Petroleum. The decree was modified by striking out this item of the recovery (R. 771).

The Circuit Court of Appeals, after concurring in the Findings of Fact of the District Court (R. 750-766) held, as had the District Court, that the charter party provided that the freight was to be paid, ship lost or not lost (R. 746), and that, despite the ultimate frustration of the voyage, Purfina was entitled to this freight and was not liable for any damages to Mitsubishi under principles of law long settled by this Court. (*The Allanwilde,* 248 U. S. 377; *The Gracie D. Chambers,* 248 U. S. 387; *The Bris,* 248 U. S. 392; *The Malcolm Baxter, Jr.,* 277 U. S. 323.)

Petitioners Do Not Present Any Conflict of Decisions Between the Circuit Court of Appeals and This Court or the Courts In Any of the Other Circuits.

The questions raised are either pure questions of fact or mixed questions of law and fact, where the law is settled by decisions of this Court. It is noteworthy that the petitioners, after enumerating nineteen so-called questions of law, follow that enumeration with twenty-three Specifications of Error to be urged, just as if they were presenting an appeal to this Court, rather than a Petition for

a Writ of Certiorari where questions of conflict between the decision below and other decisions are presented to this Court for the purpose of avoiding confusion in the law (Rule XXXVIII—(5)). In short, even a cursory reading of these so-called questions and Specifications of Error make it apparent that what petitioners are endeavoring to do is to induce this Court to review a lengthy record where the District Court (R. 99-117) and the Circuit Court of Appeals (R. 745-796) concurred as to the facts. It is settled by numerous decisions of this Court that such findings will not be disturbed. *Just* v. *Chambers*, 312 U. S. 383, 385.

The Principles of Law Sought to Be Reviewed Are Well Settled By Decisions of This Court.

The suit instituted by Purfina against Mitsubishi was for recovery of freight under a charter party which contained the following clause:

> "2. The Freight to be paid in cash in New York less 1% discount on telegraphic advice of signing Bills of Lading and is to be considered earned and not returnable ship and/or cargo lost or not lost" (R. 18).

Both Courts below found that all the conditions precedent to Purfina's right to recover the freight money had been performed (Finding XXXII, R. 112, 764), and that the freight was due and payable. On this finding the Circuit Court of Appeals held that the right of Purfina to the freight was settled by the decision of this Court. *The Allanwilde*, 248 U. S. 377; *The Gracie D. Chambers*, 248 U. S. 387; *The Bris*, 248 U. S. 392; *The Malcolm Baxter, Jr.*, 277 U. S. 323.

As to the various charges of error on the part of the Courts below contained in petitioners' brief, it is sufficient to point out that on October 3rd, the day after loading was completed, Mitsubishi was informed as to the loaded quantity of cargo, the bill of lading figures (Finding XV, R. 107), and on the next day the supplier had sent it signed copies of the bills of lading. On October 11th, Purfina formally gave telegraphic notice of the signing of bills of lading (Finding XVII, R. 107). It was also found that the bills of lading were prepared by General Petroleum Corporation, one of the petitioners herein, pursuant to Mitsubishi's instructions (Finding XI, R. 105-106). Criticism of the opinion below and of the finding (Finding XXXII, R. 112) that Purfina had complied with all conditions precedent as to its right to recover freight money, is without substance. Both Courts also found that the charges of unseaworthiness were unsustained, and that the "Laurent Meeus" was in fact seaworthy (Findings XXXVI-XXXVII, R. 112-114). The Circuit Court of Appeals concurred in these findings of the District Court (R. 752-766).

The Courts below correctly understood *National Steam Navigation Co., Ltd. of Greece* v. *International Paper Co.*, 241 Fed. 861, and applied it correctly. It is true that in that case there was a clause expressly providing that the freight was earned upon shipment of the cargo, but the Court put the shipowner's right to collect freight under the prepaid freight clause not solely upon that ground but also upon the broader ground that the primary intention running through the whole bill of lading was that the freight was intended to be earned upon the loading of the cargo and that this is the general rule

under the prepaid freight clause. Shipowners collected and retained freight under the prepaid freight clause in *The Gracie D. Chambers,* 248 U. S. 387, where there was no express provision that the freight was earned upon loading of the cargo, and the same principle was applied in *Portland Flouring Mills Co.* v. *British and Foreign Marine Insurance Co., Ltd.,* 130 F. 860 (certiorari denied, 195 U. S. 629), and *The Quarrington Court,* 122 F. (2d) 266. Thus both courts correctly held in accordance with the recognized rule that the freight was earned when the cargo was loaded and the bill of lading signed. It would therefore have made no difference in the result if, as petitioners seem to contend, the voyage was frustrated on October 2nd, for the frustration would have followed the loading, but both courts have also held that the Governmental interference of October 2nd and the succeeding Governmental interferences were mere temporary delays and not frustrations and that the voyage was not frustrated until November 16th. Long before that time the cargo had not only been loaded but the telegraphic notice had been given, and the freight from every point of view had been indisputably earned and was payable.

Petitioners argue that, regardless of the decision of this Court in cases like *The Allanwilde* and *The Malcolm Baxter, Jr.,* the collection of freight under the prepaid freight clause despite frustration of the voyage is not allowed unless the vessel has broken ground before the frustration occurs. Here, however, they come squarely up against the contrary holdings of this Court in *The Gracie D. Chambers* and in *The Bris.* Therefore they ask a re-examination and overruling of those cases. The same argument was presented to this Court in those cases, and the Court

replied that the doctrine of *The Allanwilde* was not deflected by the fact that the vessel had not broken ground before the frustration. This Court in *The Gracie D. Chambers,* 248 U. S. 387 at p. 392 said:

> "The fact does not deflect the principle of those cases.* It was not made to depend upon the fact of breaking ground, but upon the bills of lading which provided for the payment of freight upon the shipment of the goods and the right to retain it though the goods were not carried, their carriage being prevented by causes beyond the control of the carrier."

Later, this Court, in *The Malcolm Baxter, Jr.,* 277 U. S. 323, followed *The Allanwilde* and companion cases and referred to them with approval.

The Charge of Injustice in the Decision Below is Without Substance.

There is nothing unjust in those decisions. In commerce, especially in war time, there are many hazards. Some one must take the chance of loss. It is far more just to let the parties provide by contract who shall take the loss than for a court to intervene and upset their arrangements. These prepaid freight clauses have long been recognized in the law as valid and enforceable. This Court in *The Allanwilde, The Gracie D. Chambers* and *The Bris,* all *supra,* disposed expressly of any contention of inequity or injustice in their enforcement.

The Texas Company v. *Hogarth Shipping Com-*

* Referring to two shipments and cases arising out of them on *The Allanwilde,* 248 U. S. 377 (Nos. 449 and 450).

pany, Ltd., 256 U. S. 619, and *The Tornado*, 108 U. S. 342, much relied upon by petitioners, are not in point.

As for *The Tornado*, there was in that case no prepaid freight clause. Of course the shipowner failed in his action for freight brought after the destruction of the ship, which made the performance of the contract of carriage impossible. There is nothing new in the citation of *The Tornado*. It was before this Court when *The Allanwilde* was decided.

The Texas Company case did not involve any question of prepaid freight. The vessel had been chartered and was thereafter requisitioned. The charterer sued the shipowner for damages for its failure to perform the charter. The claim was denied because there was no clause in that case, as in ours, putting the risk of frustration on either party.

In our case the prepaid freight clause did just that. It was a proper and recognized means of placing loss in such a case upon a shipper. If the shipper did not wish to run the risk of loss it could have insured the risk. By signing the contract which contained the clause, it took away from the shipowner the chance to insure, because when it took from the shipowner the contract which contained the prepaid freight clause, the shipowner no longer had an insurable interest in the freight.

In view of the repeated decisions by this Court in *The Allanwilde, The Gracie D. Chambers, The Bris* and *The Malcolm Baxter, Jr.*, we submit that there is nothing here to review.

As a Last Resort, Petitioners Charge That the Belgian Government Is the Real Party In Interest, and That In Collaboration With Purfina, It Connived With Purfina to Cheat Petitioners.

This charge requires, if it is to succeed, (1) that this Court disregard concurrent findings below; (2) that it disregard the testimony of a high official of the Belgian Government; (3) that it abandon its decision in *Compania Espanola* v. *The Navemar*, 303 U. S. 68.

Petitioners, at page 22 of their brief, seek to show that the Belgian Government, and not Purfina, was the real party in interest with respect to this freight money, and that Purfina is therefore estopped to recover. They charge the Circuit Court of Appeals with error because it sustained the District Court in finding that during the period when this freight money was earned the "Laurent Meeus" was being operated for Purfina's account and that the governmental directions were merely a political control (R. 750). Thus they recognize that this, the very foundation of the errors charged against the courts below, involves the request that this Court abandon its well established rule.

We should not omit to call the Court's attention to the fact that petitioners called as a witness Captain Rene Boel, the head of the Belgian Economic Mission, a Department of the Belgian Government located at London, England (R. 596), and a high official of the Belgian Government, who was charged with the administration of all Belgian vessels under requisition. Captain Boel testified that, even after the requisition of May, 1940, the owners of certain Belgian vessels, including the "Laurent Meeus", not-

withstanding the prior requisitions, were given authority to operate their vessels "for owners' account" (R. 634). This testimony from this high official of the Belgian Government, who was actually in charge of "handling different economic and shipping problems for the [Belgian] Government" (R. 596), and the findings below, based upon it (R. 750-1), differentiates this case from those cases which rest upon facts where a vessel is in the possession of and is operated by a Government. Such was not this case because according to the Findings there was no requisition of possession, operation or management of the vessel by the Belgian Government before November 16, 1940, that is, six weeks after the cargo was loaded. Prior thereto Purfina had possession of, and was operating and managing, the "Laurent Meeus" for its own account (R. 101-102, 750-751). It was not until November 16, 1940 that the Belgian Government took possession of the vessel (R. 71-77, 82-85) through the elaborate formalities given in the evidence (R. 288-292) and reviewed in the opinion of the Circuit Court of Appeals (R. 745-766).

Petitioners state that the Circuit Court of Appeals misunderstood the facts in *The Kabalo,* 67 Lloyd's List L. R. 572. Such was not the case, as appears from the affidavit of Baron de Cartier de Marchienne, the Belgian Ambassador to the United Kingdom, filed in that case (67 Lloyd's List L. R. at p. 574). The Ambassador stated that he was informed by Commandant Rene Boel (the same witness who testified in this case), that the "Kabalo" was requisitioned for public purposes, in particular for the purpose of using the ship in defense of the Belgian State, and that he was further informed that the vessel was, through her master and crew, in the possession of

the Belgian State for the purposes aforesaid. Captain Boel has testified to the exact contrary as to the relation between the "Laurent Meeus" and the Belgian Government. He has testified that the "Laurent Meeus" was one of certain vessels which the Belgian Government permitted to be operated for owners' account (R. 634).

Conclusion.

The hollowness of the complaint of the petitioners is apparent when we turn to Point VI of their brief (Brief, p. 39). There it is contended that the record discloses that the Belgian Government wished to hold the freight earned by the "Laurent Meeus" because they needed ready cash. They say:

> "there is no reason why the Government cannot now expropriate the funds and use them for whatever purposes it desires. In fact the very peremptoriness of the Government's demands for the freights justifies the suspicion that it was not so much interested in holding them for Purfina as in building up dollar exchange in the United States" (Petitioners' Brief, p. 40).

The Circuit Court of Appeals considered this contention and pronounced it "preposterous" (R. 753). It is submitted that when a case is so desperate that a charge of this character must be made against a friendly foreign Government in order to present it to this Court, that case should not be given any consideration. When that charge has been carefully considered by two painstaking courts and found without substance, there is every reason for this Court to decline to go into the matter further. The Belgian

Ambassador in his note, printed at pages 82 to 85 of the record, repudiated the charge.

The prepaid freight clause, the restraints of Princes clause, and the war shipping clauses are all well known provisions, inserted in contracts of affreightment to provide for the contingencies which occurred in this case. The purpose of inserting these provisions in contracts of affreightments is to inform the parties to the contract which of the parties must take the anticipated risks of loss, and thereby enable the party accepting the risk to provide against such loss, by taking out insurance against it. In the present case, when Purfina and Mitsubishi inserted in the charter party for the "Laurent Meeus" the prepaid freight provision, they agreed that the risk of the loss of freight should be on Mitsubishi. *The Allanwilde, The Gracie D. Chambers, The Malcolm Baxter, Jr., supra.* Having made that agreement, only Mitsubishi was in a position to insure against the loss of freight, because only Mitsubishi had an insurable interest in the freight. To set aside the rule thus established by this Court would again throw into confusion the law which the Court has settled in four cases.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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